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Supreme Court of the United States

October Term, 1948.

Nos. 715- 716

B. B. B. CONSTRUCTION CORPORATION,
Petitioner,

against

THE AETNA CASUALTY AND SURETY COMPANY,
Respondent.

TWO CASES.

Petition of B. B. B. Construction Corporation and Brief in Support of Petition for Writs of Certiorari.

JOSEPH JOFFE,
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141 Broadway,
New York City.

THE REPORTER COMPANY, INC., New York City—1949

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Supreme Court of the United States

OCTOBER TERM 1948. Nos.

B. B. B. CONSTRUCTION CORPORATION, Petitioner, against THE AETNA CASUALTY AND SURETY COMPANY, Respondent.	Two Cases.

PETITION OF B. B. B. CONSTRUCTION CORPORATION.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of B. B. B. CONSTRUCTION CORPORATION, a New York corporation, respectfully shows the Court as follows:

I. This is a petition to review a final decision and judgments of the United States Court of Appeals for the Second Circuit, entered March 15, 1949, which reversed judgments of the District Court of the Northern District of New York in favor of the petitioner herein in the sum of $2,601.26. The petitioner, a subcontractor on a government project, was a Miller Act claimant (40 U. S. C. A., §270a-d). The recovery was for the interest on its unpaid claim and was against the surety company which supplied the payment and performance bonds required by said Act.

The Court of Appeals held, notwithstanding that under the Miller Act a claimant's cause of action accrues ninety days after the date on which the last of the labor is performed or material furnished (Title 40, U. S. C. A., §270b),

that the Federal Interpleader Act (Title 28, U. S. C. A., §41 [26] [now §1335]) nullifies this to the extent that the filing of an interpleader suit and the bond provided for by Subdivision ii thereof (now Title 28, U. S. C. A., §1335 [a] [2]), relieves the surety of the obligation to pay interest on a Miller Act claim, even though payment thereof is postponed for a number of years. The opinion of the Court of Appeals is at pages 151-155 of the record. The opinion of the District Court is at pages 137 to 144 of the record.

II. This Court has jurisdiction to review the judgments under Title 28, §347, of the United States Code (§240 of the Judicial Code) and Title 28, §350, of the United States Code.

III. The petitioner was a subcontractor of Leo Construction Co., Inc. (hereinafter called "contractor"). The latter undertook to construct two warehouses at Rome, New York, for the sum of $532,918.60 in accordance with a written contract dated February 25, 1943 (Exhibit A, p. 75*). To comply with the law (40 U. S. C. A., §270a, *et seq.*), the contractor furnished a payment bond in the sum of $266,459.30 to protect those supplying labor and materials on said job. The respondent wrote this bond (Exhibit 1 [p. 67]; Exhibit B [p. 79]).

Pursuant to the same statute, the contractor furnished a performance bond, also written by respondent, in the sum of $133,229.65 to protect the United States Government (Exhibit K, p. 123).

Sometime in July, 1943, the contractor defaulted (Exhibit 1 [12, p. 70]). On July 12, 1943, respondent caused a bankruptcy petition to be filed against the contractor, who was adjudicated a bankrupt on July 28, 1943 (Exhibit 1 [8, p. 69]). The bankruptcy having stopped all work, the Government terminated the contract on July 15, 1943 (Exhibit 1 [11, p. 69]).

*References are to the Record.

To avoid the rule of *American Surety v. Westinghouse Electric Co.*, 296 U. S. 133, which holds that until the surety paid subcontractors it has no right to moneys due the contractor from the Government, the respondent unsuccessfully tried to obtain control of the bankruptcy proceedings.

When the contract was cancelled, the contractor was indebted to the petitioner in the sum of $32,512.58. The amount is not in dispute. The petitioner duly demanded payment of said money from the respondent (Exhibit J, p. 121).

U. S. C. A., Title 40, §270b, bars a subcontractor from commencing suit for ninety days after the date on which the last of the labor is performed or material furnished. The petitioner waited more than five months, and on November 29, 1943, brought an action under the Miller Act. Before its time to answer had expired, and on December 14, 1943, respondent countered with an interpleader suit and moved to stay creditors (p. 16). Petitioner opposed the motion and demanded that respondent deposit $266,459.30 in court, which respondent refused to do (p. 141, fol. 423). The District Court granted the stay and permitted the respondent to give a bond.

Having stayed the subcontractors, the respondent then sought to have them assign to it the right to negotiate with the Government for the balance due the contractor. Respondent offered to pay 41 per cent of the claims immediately, provided creditors waived any claim against the respondent beyond the amount of the payment bond and also waived interest on their claims (Exhibit G, p. 113).

It is self-evident that the money used to pay the 41 per cent of the claims was part of the sum of $266,459.30 which respondent had refused to deposit in court.

Petitioner refused this arrangement and consequently received no payment until it made a motion for a partial

summary judgment (Exhibit 1 [26], p. 74), when the respondent paid petitioner its 41 per cent, and the petitioner delivered to the respondent an assignment of its claim, reserving its rights to the balance of its claim and to the interest (Exhibit H, p. 114).

Petitioner waited for payment of its money until September, 1947. It then moved successfully against opposition to vacate the stay of May 2, 1944, and the case was set for trial. By agreement the only question tried was petitioner's right to interest. The District Court decided that petitioner was entitled to such interest (pp. 137 to 144, inclusive).

IV. The Court of Appeals reversed and dismissed the claim, holding that the Federal Interpleader Act was a reasonable limitation on the remedy in §2 of the Miller Act. The Court held that under the Federal Interpleader Act the surety could stop the running of interest by (a) depositing the money into court, or (b) giving a bond (pp. 151 to 156).

Under this decision the payment of a Miller Act claimant can be delayed indefinitely without compensation. This nullifies the intent of the Miller Act, which was stated by Mr. Justice Douglas in *MacEvoy Co. v. United States*, 332 U. S. 102 (footnote at p. 105), as follows:

> "Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious inconveniences and delays resulted. The claimants often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties by requiring that the prime contractor execute two bonds—a performance bond to protect the government and a payment bond to protect the

creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied. Hearings on H. R. 2068, *et al.*, Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong., 1st Sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 S. Rep. No. 1238 (74th Cong., 1st Sess.)."

The construction given to the Federal Interpleader Act is also contrary to the express Congressional intent.

The report of the Committee on the Judiciary, submitted by Senator Hebert of Rhode Island to the 73rd Congress, 2nd Session, appearing as calendar #1517 and report #1417, recommending the passage of the bill, says on page 5 thereof:

"The amended bill allows the stakeholder, as an alternative to a deposit, to file a surety bond approved by the court. Although the disputed subject matter will ordinarily be deposited in court, situations sometimes arise where the rigid requirement of a deposit would prevent just relief. For example, it is obvious that a deposit is impracticable when one claimant to the benefits of life insurance demands one disposition (or option) under the policy and the other claimant demands a very different disposition (or option). To illustrate, if claimant A demands the cash surrender value of the policy and claimant B demands the continuance of the insurance with the cash surrender value left intact, the requirement to deposit the thing in dispute cannot readily be complied with. Yet it would be harsh to deny interpleader under such circumstances. A bond in such a case will protect the claimants. Also the deposit of the fund in court involves a deduction for the clerk's commission (sometimes called poundage) and there will be no such deduction in the case of a bond. *Moreover, the bond will entitle the winning claimant to interest.*" (Italics ours.)

This session ended shortly thereafter without taking action on the bill. The report of the Committee on the Judiciary submitted by Mr. Austin on April 15th to the 74th Congress, 1st Session, Calendar No. 583, Report No. 558, adopted Report No. 1417 and recommended the enactment of the bill. This Congress passed the bill (Act Jan. 20, 1936 c 13 §1, 49 Stat. 1096), which thereafter became the law known as 28 U. S. C. A. §41 (26) (ii) (now 28 U. S. C. A. §1335 [a] [2]).

The decision results in an anomalous situation wherein the subcontractor, to whom the surety company owed a primary obligation under the Miller Act bond, was left unpaid to the extent of its demand for interest, while the surety company was permitted to retain the sum of $13,449.05 for its own benefit (p. 155).

V. Your petitioner respectfully submits that the decision:

(a) Is probably in conflict with the applicable decision of this Court. *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376.

(b) Involves the construction of an important Federal statute which the Supreme Court has not settled. The point involved is of continuing importance because of the frequency with which this question will arise under this provision of the Interpleader Act. The decision on this point will determine the effectiveness of the Miller Act. *Dugas v. American Surety Co.*, 300 U. S. 414; *Worcester County Co. v. Riley*, 302 U. S. 292; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66.

(c) Is an untenable as well as an unjust construction of the Interpleader Act and is contrary to the intent as expressed by the committee's report to the Congress which enacted it. *Senate Report No. 558*, 74th Congress, 1st session.

(d) Determines a question of law of general commercial importance.

WHEREFORE, your petitioner prays:

(a) That a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day to be designated in said writ, a full and certified transcript of the record and of proceedings in the Court of Appeals for the Second Circuit in the suits entitled, "The Aetna Casualty and Surety Company against B. B. B. Construction Corporation and The United States of America, to use of B. B. B. Construction Corporation against The Aetna Casualty and Surety Company, a corporation," to the end that the said suits may be reviewed and determined by this Court as provided in United States Code, Title 28, Judicial Code and Judiciary, §350; and that the decision and judgments of the Court of Appeals for the Second Circuit in the said suits may be reversed by this Honorable Court.

(b) That your petitioner may have such other and further relief as to this Court may seem proper and just, and in conformity with the laws of the United States.

(c) And your petitioner will ever pray, etc.

B. B. B. CONSTRUCTION CORPORATION,
By JOSEPH S. BARTLEY,
Pres.

JOSEPH JOFFE,
Of Counsel for Petitioner.

State of New York,
County of New York, ss:

JOSEPH S. BARTLEY, being duly sworn, deposes and says that he is the President of B. B. B. Construction Corporation herein; that he has read the foregoing petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by B. B. B. CONSTRUCTION CORPORATION is because the said B. B. B. CONSTRUCTION CORPORATION is a corporation, and deponent an officer thereof, to wit, its President.

JOSEPH S. BARTLEY.

Sworn to before me this
7th day of April, 1949.
ORRIE L. SHURE,
Notary Public, of the State of New York,
Kings County,
Cert. filed N. Y. County.
Commission expires March 30, 1950.

(Notarial Seal)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

JOSEPH JOFFE,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1948 Nos.

B. B. B. CONSTRUCTION CORPORATION,
Petitioner,
against
THE AETNA CASUALTY AND SURETY COMPANY,
Respondent.
} Two Cases.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

ARGUMENT.

POINT I.

The Court of Appeals decision is in conflict with the applicable decision of this Court.

In the case of *Illinois Surety Company v. John Davis Co.*, 244 U. S. 376, this Court (Mr. Justice Brandeis) said at page 381:

> "The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that State. *Scotland County v. Hill*, 132 U. S. 107, 117. Under the law of Illinois, the liability of a surety on a bond is extended beyond the penalty by way of interest from the date when the liability on the bond accrued. *Holmes v. Standard Oil Co.*, 183 Illinois, 70. See *United States v. U. S. Fidelity Co.*, 236 U. S. 512, 530, 531. The

> liability here accrued at least as early as the commencement of the suit. The Surety Company contends that the amount each claimant was to receive was not made definite until it was actually decided by the Court of Appeals. But the claims were all for liquidated amounts; and in no instance was the amount in dispute. The controversy was merely as to which of the claimants should be entitled to share in the liability under the bond. The Surety Company might have paid into court at the commencement of the suit an amount equal to the penalty of the bond. It did not elect to do so; and as the aggregate liability on the claims exceeds the penalty, it was properly held for an additional amount equal to interest from the commencement of the suit."

The Court of Appeals conceded as much but held that the Federal Interpleader Act of 1936, changed the law. This conclusion is contrary to the legislative intent as shown by the reports of the Senate Judiciary Committee. It is also unrealistic and unjust. The petitioner's rights were determined at the time of the commencement of the suit by reason of applicable provisions of the Miller Act and did not arise out of any provisions of the Interpleader Act.

POINT II.

The Federal Interpleader Act of 1936 and its legislative history.

(a) Pomeroy in his TREATISE ON EQUITY JURISPRUDENCE, 5th Ed., Vol. 4, page 894, says:

> "Interpleader is a remedy which is purely ancillary and provisional and does not affect any primary right nor confer any ultimate relief."

And again at page 901:

> "Remedies Purely Ancillary and Provisional.
>
> "The distinguishing characteristic of the remedies belonging to this group is, that they determine no primary rights, and grant no final reliefs, either directly or indirectly. They are, in fact, instruments and means by which the Court is enabled more conveniently and perfectly to adjudicate upon the *ultimate* rights and interests of the parties, and to award the *final* reliefs, in the further judicial proceedings to which they are auxiliary, and of which they are really the preliminary stage. These remedies are therefore, in every sense of the terms, ancillary and provisional." (Italics in original.)

The Court of Appeals said that but for the Interpleader Act of 1936, petitioner would have been entitled to interest (p. 156). The decision invoked this remedial procedural statute to destroy a well-established right under the substantive law, to wit, the right to interest. As was said by this Court in *National Bank of the Commonwealth v. Merchants' National Bank*, 94 U. S. 437, 440: "When the right to recover exists * * * it includes interest as well as principal." *Ticonic Bank v. Sprague*, 303 U. S. 406, 410, is to the same effect. The decision of the Court of Appeals results in an injustice in that while the creditor was deprived of the money justly due him, the surety by refusing to deposit the money was able to utilize it commercially. *Seth Spring and Son v. The South Carolina Insurance Co.*, 21 U. S. 268, 293.

The Circuit Court of Appeals for the Seventh Circuit considering this statute in *Railway Express Agency v. Jones*, 106 Fed. (2nd) 341, said at page 344:

> "The interpleader statute was enacted for the protection of one who makes no claim to money in

> his possession and who wishes to be relieved of liability, where the diverse parties are making adverse claims to the fund."

It is only reasonable to conclude that where a person, who makes no claim to the money, does not deposit it in court but gives a bond, he should be charged for the use of said money which he acknowledges does not belong to him.

Interest is customarily allowed as compensation for delay in payment. *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697, 715.

(b) The interpretation placed by the Court of Appeals on the Interpleader Act is contrary to its legislative history.

The reports of the Committees on the Judiciary of both the 73rd and 74th Congress justified the giving of the bond as an alternative for deposit of money in the court by explaining that where a bond is given interest will be awarded to the winning claimant.

> "A bond in such a case will protect the claimants. Also the deposit of the fund in court involves a deduction for the clerk's commission (sometimes called poundage) and there will be no such deduction in the case of a bond. *Moreover the bond will entitle the winning claimant to interest.*" (Italics ours.)
>
> Reports of the Committee on the Judiciary to 73rd Congress, 2nd Session, Calendar No. 1517, Report No. 1417, page 5, and 74th Congress, 1st Session, Calendar No. 587, Report 558, page 6.
>
> Zechariah Chafee, Jr., The Federal Interpleader Act of 1936; I Yale Law Journal, Vol. 45 (April, 1936), 963 at pages 977-978, Note 45.

The legislative history of the Federal Interpleader Act indicates that Congress did not intend to permit the giving of a bond as a complete alternative for the deposit of funds into court. The Congress understood the legal effect and commercial value of retaining the use of money on the part of the person seeking relief under the interpleader statute. Interpleader in the United States Court, 41 Yale Law Journal 1134, 42 Yale Law Journal 42.

In recommending the bill for passage, it specifically stated that where there is no deposit of funds in court, the successful claimant would be entitled to interest. The reason for such statement is apparent to any person versed in commerce. The use of funds is of great economic value. And if such provision was not made conditional, the deposit of money into court would become nothing but a memory. On the same principle as Gresham's Law (tendency of bad money to drive out good money), the giving of the bond will supersede the deposit of money into court, for the former is much cheaper than the latter.

As this Court, in *Phillips v. Commissioner,* 283 U. S. 589, 594, considering another statute, said:

> "That Congress deemed the Section necessary in order to make the tax collecting system more effective is established not only by the fact of enactment but also by reports of the committees."

And again, in *United States v. American Trucking Association,* 310 U. S. 534, 543:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' *Boston Sand & Gravel Co. v. United States,* 278 U. S. 41, 48. *Harrison v. Northern Trust Co.,* 317 U. S. 476, 479."

The interpretation of the Federal Interpleader Act of 1936 contended for by the petitioner is meritorious, is supported by Committees' Reports, the history and the purpose of the Act, and should be upheld. *United States v. Congress of Industrial Organization,* 335 U. S. 106, 120.

CONCLUSION.

The petition for the writs of certiorari should be granted.

Respectfully submitted,

JOSEPH JOFFE,
Counsel.

New York, April, 1949.

ADDITION.

THE MILLER ACT, 40 U. S. C. A. 270B AND 270C.

§270b. Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any

manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, par. 2, 49 Stat. 794.

§270c. *Same; right of person furnishing labor or material to copy of bond.*

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. Aug. 24, 1935, c. 642, par. 3, 49 Stat. 794.

TITLE 28, U. S. C. A. Sec. 41, Subd. (26):

(ii) The complainant (a) has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court; or (b) has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the complainant with the future order or decree of the court with respect to the subject matter of the controversy.

Now Section TITLE 28, U. S. C. A. Section 1335.

74th Congress
1st Session

Senate

Calendar No. 583

(Report
(No. 558

THE FEDERAL INTERPLEADER BILL.

Mr. Austin, from the Committee on the Judiciary, submitted the following *Report* (to accompany S. 1277):

"5. The stakeholder may either deposit the fund in court or file a bond. In the original bill, the deposit clause precedes the jurisdiction clause, but the amendment places it after that clause. Thus paragraph (a) of the amendment describes successively the persons who can file bills of interpleader, the subject matter in dispute, and the claimants; and then proceeds to state the requirement of deposit of the 'res' in court. The deposit clause departs from the existing statute in some respects.

"The amended bill allows the stakeholder, as an alternative to a deposit, to file a surety bond approved by the court. Although the disputed subject matter will ordinarily be deposited in court, situations sometimes arise where the rigid requirements of a deposit would prevent just relief. For example, it is obvious that a deposit is impracticable when one claimant to the benefits of life insurance demands one disposition (or option) under the policy and the other claimant demands a very different disposition, or option). To illustrate, if claimant A demands the cash surrender value of the policy and claimant B demands the continuance of the insurance with cash surrender value left intact, the requirement to deposit the thing in dispute cannot readily be complied with. Yet it would be harsh to deny interpleader under such circumstances. A bond in such a case will protect the claimants. Also the deposit of the fund in court involves a deduction for the clerk's commission (sometimes called poundage) and there will be no such deduction in the case of a bond. Moreover, the bond will entitle the winning claimant to interest."

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B. B. B. CONSTRUCTION CORPORATION,

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—against—

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Respondent.

Two Cases

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the U. S. Court of Appeals for the Second Circuit (R. 151, 157) has not as yet been officially reported.

Jurisdiction

Jurisdiction of this Court is invoked by the petitioner under the provisions of Title 28, Section 347 of the United States Code (Section 240 of the Judicial Code) and Title 28, Section 350 of the United States Code.

Questions Presented

Petitioner would have it appear that important questions of law are presented by the decision of the Court

below. Naturally, that claim would be made otherwise there would not have been even a pretense for the filing of the instant petition. The case, however, is *sui generis.* It does not involve the general question of whether a surety can stop the running of interest by giving a bond under the Federal Interpleader Act, nor did the Court below make any such determination. On the contrary, all that the Court below determined was that under the extraordinary circumstances herein involved the surety was not in default at any time, and inasmuch as interest does not begin to run until there is a default in the performance of the condition of the bond under the New York State Statute, which governs this case, the surety could not be charged with interest. Perhaps it is best to state the question in the concluding language of the Court of Appeals opinion (R. 154-155) *viz*:

> "Here the bond was so filed with explicit approval of this district judge. Indeed defendant asserts that it asked the judge to require the deposit of money; while plaintiff quotes his unreported decision approving the $100,000 bond as adequate, saying 'that here there is no question of the financial ability of the plaintiff,' and pointing out that plaintiff, in addition to filing the bond, had already paid out money to the mechanics and laborers who had claims, and had made, and was attempting to make, other payments to claimants. In view of this decision we do not think the judge can now appropriately find the surety in default in following the option expressed in the Act itself and his own directions and findings. The case is therefore one where the surety never having been in default cannot be held for interest. *American Surety Co.* v. *Lawrenceville Cement Co., supra; United States* v. *Anchor Warehouses,* 2 Cir., 92 F.

2d 57, certiorari denied *Fidelity & Casualty Co. of New York* v. *United States*, 302 U. S. 755. The claim must be dismissed".

Statement

The petition contains such a distorted statement of the facts that we are compelled to set the same forth at considerable length so that this Court may have a clear picture of the special circumstances that confronted the Court of Appeals.

On February 25, 1943, the United States entered into a contract with a concern known as Leo Construction Co., Inc. (hereinafter referred to as the "Bankrupt") for the construction of two warehouses at Rome, New York, at the price of $532,918.60. As required by the Miller Act (40 U. S. C. A. Section 270-a *et seq.*) the bankrupt obtained and filed a payment bond executed by the respondent in the sum of $266,459.30 (67). After the bankrupt had performed part of its contract it defaulted leaving unpaid workmen, subcontractors and material men (69). On July 15, 1943, the United States terminated the contract and relet the work to others (69-70). About two weeks later an adjudication in bankruptcy followed (69).

On or about December 10, 1943, the petitioner and other claimants brought suit against the respondent demanding payment under the respondent's Miller Act Bond, and many other claimants threatened similar actions (70). By December 14, 1943, total claims of $502,979.72 had already been filed against the respondent, with its payment bond limited to $266,459.30 and threats of additional actions and claims. Under these conditions, respondent commenced the instant interpleader action, making all then known claimants defendants. At the same time respondent moved to stay all separate actions and consolidate them with the

interpleader action so that all claimants having any right under the respondent's payment bond could be brought in and a determination had of all claims (71). On May 2, 1944, the District Court granted the respondent's application for an injunction *pendente lite* and ordered all actions consolidated with the interpleader action. It is noteworthy that after respondent commenced the action, 28 additional claimants, totaling $38,405.05, became parties, making the total claims then asserted in the amount of $541,388.77 (86) against respondent's bond of $266,459.30. It is also of the utmost significance that the time for the filing of additional claims was still open as the Comptroller General of the United States had not as yet certified the date of final settlement. Under U. S. C. Title 40 Section 270-c any claimant had a right to bring an action under the payment bond within one year of the date of final settlement as certified by the Comptroller General. It was not until *June 25, 1948,* that the Comptroller General certified the date of final settlement as *February 26, 1948* (126). Obviously respondent's bond was insufficient to pay the claimants 100% of their claims unless the claims were reduced and the respondent successful in recovering a substantial amount from the Government as the balance payable on the defaulted contract.

Promptly after the consolidation order was signed Aetna completed agreements with all conceded Miller Act claimants (other than petitioner) paying them 41% of the amount of their claims as temporarily agreed upon with the understanding that when the actual amounts were determined further percentages would be paid to the limit of Aetna's bond plus any amounts realized from the Government until the claimants had received 100% of all their claims. All claimants, other than petitioner, waived any claim they might have had to interest and assigned their claims to respondent so as to enable it to carry on its

action in the Court of Claims (71, Exhibit G). Petitioner's position at this juncture is highly significant. It at first refused to cooperate in any way electing to play the role of the proverbial dog in the manger.

Petitioner apparently realized that unless respondent had an assignment of its claim respondent might find difficulty in asserting the claim to the contract balance which was the subject of the Court of Claims action. Finally, however, petitioner saw the light of day and executed a qualified assignment of its claim to the respondent which enabled respondent to continue its action in the Court of Claims without question and at the same time petitioner received the same 41% partial payment of its claim as all other claimants received. *Thus by November 24, 1944, plaintiff had paid $176,263.43 against its bond of $266,459.30* (72-73). A year later it paid an additional $19,243.05, and on October 26, 1946 an additional $19,243.05 making total payments to October 26, 1946 in the amount of $215,749.53. *At no time could the entire amount of the bond be paid because the time was still open for new claimants to assert their rights against the bond.* Respondent in the meantime was endeavoring to reach the Government fund.

There were three obstacles.

(1) The Bronxville Trust Co. had an all money assignment from the bankrupt on which it claimed $59,077,.54. This claim respondent succeeded in reducing in half by compromise.

(2) The Trustee in Bankruptcy claimed the fund. This respondent overcame by agreement to pay the Trustee's and Referee's fees and commissions plus $5,000 to the Trustee's attorney.

(3) Government tax claims for over $150,000, which respondent finally compromised at about $22,000.

Thus by February 26, 1948, the respondent had succeeded in disposing of all adverse claims to the Government funds and on June 17, 1948 respondent received $160,124.81 from the Government. It immediately paid the balance of its bond to the claimants and applied so much of the Government fund as was necessary so that all claimants received 100%. Thus, the following was the final result brought about at the sole expense of respondent:

Total Miller Act Claimants including laborers —as finally reduced		$403,331.31
Full amount of Aetna Bond paid to Claimants		266,459.30
Deficit to claimants after payment in full of Bond amount		$136,872.01
Amount of salvage received by Aetna from the Government was	$160,124.81	
The following sums come out of said salvage:		
To Trustee's attorney	$5,000.00	
Trustee's commissions	1,601.25	
Commissions of Referee	3,202.50	
Total	9,803.75	
Leaves balance of salvage	$150,321.06	
Paid by respondent to claimants their deficit of	136,872.01	
Leaving balance to respondent	$13,449.05	

At page 6 of its petition petitioner suggests that it has been injured because respondent was permitted to retain the above sum of $13,449.05 although petitioner received no interest. Both Courts below answered that contention by pointing out the unquestioned expenses and legal fees of the respondent as being far in excess of the balance realized. Suffice it to say that every claimant most substantially benefited by what the respondent did.

If respondent could have been relieved of its bond obligation by a deposit in Court, it is doubtful whether the necessary contests between the 77 claimants would have been as successful in chopping away exaggerated or improper claims as was respondent. Certainly 77 litigants in contest with each other would have caused great havoc and expense to the claimants. The claimants had no rights against the Government. If the Trustee would have had any success in his action against the Government, the claimants would have had to abide contests of other creditors in the Bankruptcy Court before getting any relief. As it was, all claimants, including petitioner, received 100% of their claims.

Under the foregoing circumstances the Court of Appeals found that respondent did everything it possibly could and that it was never in default so as to commence the running of interest.

Reasons for Denying Application for Writ

Petitioner contends that the decision of the Court of Appeals is in conflict with the applicable decision of this Court in *Illinois Surety Co.* v. *Davis*, 244 U. S. 376. Petitioner is completely in error. All that this Court decided in *Illinois* v. *Davis* (*supra*), was that any question pertaining to liability for interest in a Heard Act case must be

determined by the law of the particular state where the work was performed. There never was any question of that rule, and in fact the Court of Appeals specifically stated (R. 153):

> "The parties and the court below appear to be in accord that the surety's liability for interest must be determined by the law of New York, the state where the contract and the bond were made; and we are not disposed to question this, since the Miller Act contains no specific provisions as to it. See *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376."

The real question decided by the Court of Appeals was that under New York Law the facts clearly warranted a denial of interest. It is highly significant that the petitioner presently makes no argument that the Law of New York requires the imposition of interest. In the Court of Appeals the petitioner had the temerity to suggest that the New York law was the same as that of Illinois, but, of course, there was no merit whatever to that statement as the New York law on the question of interest is entirely dissimilar to that of the State of Illinois. It is noteworthy that no contention is now made by the petitioner as to the similarity between the New York law and the Illinois law. In speaking of the New York Law, the Court of Appeals said:

> "At any rate, under it interest does not begin to run until there is a default in the performance of the condition. N. Y. Civil Practice Act Sec. 160. Furthermore it is stated: 'In this state, a surety on a bond given pursuant to statute * * * is chargeable with interest, not from the default of the principal, but from the time when he could have safely paid the same

providing he then unjustly withholds it.' Tuzzeo v. American Bonding Co. of Baltimore, 226 N. Y. 171, 178, 123 N. E. 142."

It was in the same *Tuzzeo* case that the New York Court of Appeals had laid down the law with respect to the allowance of interest, stating at page 179:

"The allowance of interest is sometimes determined upon consideration of equity and natural justice. (Woerz v. Schumacher, 161 N. Y. 350; Brainard v. Jones, 18 N. Y. 35; Blum v. Mayer, 189 N. Y. 153, 158.)"

All claimants could not have been ascertained until one year after February 26, 1948, the date of final settlement fixed by the Comptroller. It was never legally safe to pay before then. Section 270b (a), Title 40 U. S. C. A., provides that "all who furnish labor or material shall have the right to sue on the payment bond for the balance unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment," etc. Subdivision (b) limits the period of the commencement of such action to one year "after the date of final settlement of such contract." It is also highly significant that the statute says nothing about recovery of interest, that is why it was necessary to apply New York law.

Where the claims of suppliers exceed the amount of the bond indebtedness, each supplier's claim is only for the proportion of the bond amount that such claim bears to the total claims. There was no way of knowing, by any form of computation, what the debt to any supplier would be, until the claims of all suppliers were known. It is not who comes first or last—the Statute says that all are to be paid by the same bond, and the total amount of all claims

must first be known, or be capable of being computed, before the Surety can pay its bond debt and be discharged.

In an action under the Miller Act, the Court cannot bar any claim and anyone supplying labor and material has the right to bring an action up to one year after the date of final settlement. The fixing of that date is the function of the Comptroller General of the United States and not the Court. Thus, the payment of the money into Court would have benefited no one and would have relieved no one. As a matter of fact, the Court could not order any distribution as it had no right to impose any risks on the surety until the expiration of the statutory period.

The respondent could never have relieved itself of its bond obligation to any claimant who filed within the statutory period. Had respondent deposited the money in Court, it could not act as a bar to any such claim.

It is respectfully submitted that the Court of Appeals properly considered the history of the instant case and the very opinion of the District Court Judge in the instant case. To begin with, the District Court Judge had refused to order a deposit when the petitioner originally requested it, saying:

> "It is suggested that the plaintiff be required to deposit the full amount of the payment bond in this Court as a condition to the granting of an injunction pendente lite. Here there is no question of the financial ability of the plaintiff. The plaintiff has in fact filed a bond herein in the amount of $100,000., conditioned upon its compliance with the future orders and decrees of this Court. It has already paid about $18,000. to mechanics and laborers, who have or had claims under

the bond, and it appears that the plaintiff has made and is attempting to make other payments to claimants." (Unreported.)

Later when the same Judge considered what respondent ultimately accomplished he stated (R. 141):

> "If Aetna had been relieved of liability by payment into court, and abandoned its efforts to adjust the claim with the government, it would be a matter of speculation as to whether the amount so deposited, plus the fund obtained from the government, would have been sufficient to pay the creditors in full. Certainly there would have been additional attorneys' fees and expenses, since the Aetna makes no charge therefor, but again we are asked to deal with the probabilities or possibilities which are not the measure of the obligation of the bond. The result accomplished for all Miller Act claimants was good, but the obligation is unchanged."

There is little wonder, therefore, that the Court of Appeals, commenting on the lower Court's action said (155):

> "In view of this decision we do not think the judge can now appropriately find the surety in default in following the option expressed in the Act itself and his own directions and findings. The case is therefore one where the surety never having been in default cannot be held for interest. American Surety Co. v. Lawrenceville Cement Co., supra; United States v. Anchor Warehouses, 2 Cir., 92 F. 2d 57, certiorari denied Fidelity & Casualty Co. of New York v. United States, 302 U. S. 755. The claim must be dismissed."

The fact is that there is nothing in the Miller Act which obligates respondent to the immediate payment of any part of the claim where the claims exceed the amount of the bond and the time for the filing of claims has not expired. There is nothing in the Miller Act which authorizes a deposit of the monies in Court so as to relieve the Surety. In fact, it would have been sheer speculation at any time prior to the expiration date for the filing of the claims for the Court to order any payment if the amount of the bond was deposited in Court. It is more than idle speculation to even suggest that the Court would have ordered any payment without respondent's consent. It was for that very reason that the Court said on the granting of the motion for an injunction "this Court does not feel that it should interfere with the voluntary liquidation of plaintiff's liability under the bond, *undertaken, of course, at its own risk.*" (Unreported.) (Italics ours.) The payments that were made by respondent were made at its own risk and there would have been no justification for the Court in assuming or imposing such a risk on respondent without its consent.

A case directly in point is *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 717, where the surety company had, as in our case, furnished a statutory bond on a federal job conditioned for the payment of labor and materials. The contractor failed. Claims were then made exceeding the penal sum of the bond. Facing many suits, the surety company filed an equity action, expressing itself as willing to pay the penal amount of its obligation, and, by its Bill in Equity, asked the Court's aid in ascertaining to whom payment should be made. The Court entertained the Bill in Equity and sent the case to a Master to ascertain

in what manner the claims should be recognized. At page 720 the Court said:

> "Inasmuch as the case shows that the complainant has at all times been ready to discharge the entire amount of its penal obligation as soon as it could be ascertained to whom it should be paid, it cannot now be held in default, and therefore it will be entitled to be discharged on a payment of the principal without interest, unless further in default at some subsequent stage of this suit."

The decision is important, in that it holds that a surety which is ready to discharge the entire amount of its penal obligation as soon as it can be ascertained to whom it should be paid, is not in default of its bond contract and is not chargeable with interest.

At page 11 of the instant petition, petitioner says:

> "The Court of Appeals said that but for the Interpleader Act of 1936, petitioner would have been entitled to interest" (P. 156).

The reference is wholly inaccurate because the Court made no such statement at page 156 nor did it make such a statement at any other part of its opinion. Petitioner's unjustified statement is in line with its apparent effort to make it appear that the opinion of the Court of Appeals involved a general interpretation of the Interpleader Act or the Miller Act. Whether or not the Interpleader Act requires interest is immaterial, since the real question is whether the New York State Law requires the award of interest where it is evident that the surety is not in default of the condition of its bond and where it is further con-

ceded that the surety not only did an excellent job but that every equity speaks in favor of the surety. Bearing in mind that the Court of Appeals of the State of New York stated in the *Tuzzeo* case, upon which petitioner originally relied, that the question of interest is sometimes determined upon consideration of equity and natural justice, it is quite clear that the Court below came to a proper conclusion in applying the law of the State of New York to the facts of this case.

It is respectfully submitted that the Interpleader Act as such is not involved as the law which the Court applied is as old as the doctrine enunciated in *Amercan Surety* v. *Lawrenceville Cement Co.*, 110 Fed. 717, the principles of which have been consistently followed whenever the question arose.

It is, therefore, respectfully submitted that this case is clearly *sui generis* and involves no general principles which require review by this Court.

It is respectfully submitted that the petition for writ of certiorari should be denied.

May 2nd, 1949.

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David Morgulas,
Of Counsel.

APPENDIX

Sec. 160, N. Y. Civil Practice Act

ACTION UPON A PENAL BOND. A bond in a penal sum, executed within or without the state and containing a condition to the effect that it is to be void upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum or to perform the act specified in the condition thereof. But the damages to be recovered for a breach or successive breaches of the condition, cannot exceed, in the aggregate, the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon from the time when the defendant made default in the performance of the condition.